

Employee Privacy Laws: Pennsylvania

TOM JOHNSON, DECHERT LLP, WITH PRACTICAL LAW LABOR & EMPLOYMENT

A guide to state law on employee privacy laws for private employers in Pennsylvania. This Q&A addresses employee privacy rights and the consequences for employers that violate these rights. Federal, local or municipal law may impose additional or different requirements.

OVERVIEW OF STATE PRIVACY LAW

1. Please list each state law relating to employee privacy (for example, employee right to privacy, access to personnel files, electronic communications, surveillance and monitoring, medical examinations, and lawful off-duty activity laws), EXCEPT state laws on background checks and drug testing. For each, please describe:

- What activity the law protects.
- Which employers are covered.
- Which employees are covered, including any exceptions for interns, independent contractors, minors or others.
- Whether the law protects employees from their co-workers' actions in addition to their supervisor's actions.
- Whether it provides for a private right of action.
- For statutes and regulations, the entity that administers the statute or regulation(s).

THE PENNSYLVANIA WIRETAPPING AND ELECTRONIC SURVEILLANCE CONTROL ACT: 18 PA. CONS. STAT. §§ 5701 TO 5782

Protected Activity

The Pennsylvania Wiretapping and Electronic Surveillance Control Act (Wiretap Act) limits an individual or entity's ability to monitor another's activities and communications (18 Pa. Cons. Stat. §§ 5701 to 5782). Under the Wiretap Act, it is a third degree felony to intentionally do or attempt to do any of the following to any wire, electronic or oral communication without all parties' consent:

- Intercept.
- Disclose.
- Use.

(18 Pa. Cons. Stat. § 5703; *Commonwealth v. Deck*, 954 A.2d 603, 609 (Pa. 2008).)

For example, in *Commonwealth v. Saccol*, an employer was convicted under the Wiretap Act after he had wiretapped the phones at his dry cleaning business to record his employee's personal calls (557 A.2d 1095 (Pa. 1989)).

However, the Wiretap Act does not apply:

- When all parties to a communication have given prior consent.
- To personnel of a business engaged in telephone marketing or telephone customer service if:
 - the business only uses the interceptions for training, quality control or monitoring; and
 - one party in the communications must have consented to the interception.

(18 Pa. Cons. Stat. § 5704(4), (15).)

Unless the law is renewed by the Pennsylvania State Legislature, the law expires on December 31, 2018 (18 Pa. Cons. Stat. § 5781).

Covered Employers

The law covers all persons, which is defined as any:

- Individual.
- Partnership.
- Association.
- Joint stock company.
- Trust.
- Corporation.
- Federal employee or agent.
- State or local government employee or agent.

(18 Pa. Cons. Stat. § 5702.)



Covered Employees

All individuals are covered under this law (see *Covered Employers*).

Co-worker Violations

The law does not address co-worker violations.

Private Right of Action

An aggrieved person generally may file a civil action against another party if the other person does or causes another person to do any of the following to the person's wire, electronic or oral communication:

- Intercept.
- Disclose.
- Use in violation of the Wiretap Act.

(18 Pa. Cons. Stat. § 5725.)

Administration

The law does not specify an entity for administration.

THE PENNSYLVANIA INSPECTION OF EMPLOYMENT RECORDS LAW (PERSONNEL FILES ACT): 43 PA. STAT. ANN. §§ 1321 TO 1324**Protected Activity**

Under the Personnel Files Act, an employee has a right to review files that contain information about the employee that the employer maintains (43 Pa. Stat. Ann. § 1322). For a list of covered files, see *Question 2*.

Covered Employers

All public and private employers in Pennsylvania are covered under this law (43 Pa. Stat. Ann. § 1321).

Covered Employees

The Personnel Files Act defines an employee as any person currently:

- Employed.
- Laid off with recall rights.
- On a leave of absence.

However, this law excludes applicants for employment and any other person. (43 Pa. Stat. Ann. § 1321.) Pennsylvania courts have held that "any other person" includes former employees (*Beitman v. Dep't of Labor & Indus.*, 675 A.2d 1300, 1302 (Pa. Commw. Ct. 1996)). However, the court in *Beitman v. Dep't of Labor & Indus.* also noted in dicta that the phrase "currently employed" may apply to certain former employees who request to inspect their personnel files either contemporaneously with their termination or within a reasonable time immediately following termination (675 A.2d at 1302).

Co-worker Violations

The law does not address co-worker violations.

Private Right of Action

The law does not specify a private right of action. An aggrieved individual must exhaust all internal and administrative remedies (see 43 Pa. Stat. Ann. § 1324).

Administration

The Pennsylvania Department of Labor and Industry, Bureau of Labor Standards (BLS) administers and enforces this law (43 Pa. Stat. Ann. § 1324).

CONFIDENTIALITY OF HIV-RELATED INFORMATION ACT: 35 PA. STAT. ANN. §§ 7601 TO 7612**Protected Activity**

The Confidentiality of HIV-related Information Act (Information Act) provides broad confidentiality for HIV-related information to protect individuals from inappropriate disclosure and subsequent misuse of the information (35 Pa. Stat. Ann. § 7602(a)). Under this law, a person cannot disclose another person's HIV-related information of another without that person's written consent, except in the limited situations specified in the statute (35 Pa. Stat. Ann. § 7607).

Covered Employers

The Information Act covers all persons, which includes all employers in Pennsylvania (35 Pa. Stat. Ann. § 7607).

Covered Employees

The law covers all individuals for whom confidential HIV-related information exists.

Co-worker Violations

The law does not address co-worker violations.

Private Right of Action

An aggrieved individual has a private right of action under this law (35 Pa. Stat. Ann. § 7610).

Administration

The law does not specify the entity that administers this law.

PENNSYLVANIA DRUG AND ALCOHOL ABUSE CONTROL ACT: 71 PA. STAT. ANN. §§ 1690.101 TO 1690.115**Protected Activity**

The Pennsylvania Drug and Alcohol Abuse Control Act (PASAACA) requires that patient records and other information prepared or maintained by a county-based prevention, intervention and treatment programs for drug and alcohol abuse be treated as confidential. The records or information may only be disclosed:

- With the patient's consent.
- Either to:
 - medical personnel to diagnose and treat the patient; or
 - government or other officials to obtain benefits for the patient as a result of the condition.

(71 Pa. Stat. Ann. § 1690.108.)

However, the records may be disclosed without written consent either:

- During an emergency where the patient's life is in jeopardy.
- In accordance with a court order.

(71 Pa. Stat. Ann. § 1690.108.)

Covered Employers

The law is not specific to employers, but covers all individuals and entities in Pennsylvania for whom drug and alcohol treatment records exist.

Covered Employees

The law covers all individuals in Pennsylvania.

Co-worker Violations

The law does not address co-worker violations.

Private Right of Action

The law does not specify a private right of action.

Administration

The PASAACA does not specify an entity that administers this law.

BREACH OF PERSONAL INFORMATION NOTIFICATION ACT: 73 PA. STAT. ANN. §§ 2301 TO 2329**Protected Activity**

The Pennsylvania Breach of Personal Information Notification Act (BPI-NA) requires an entity that maintains, stores or manages computerized data that includes personal information to provide notice of any breach of the data system's security after discovering a breach of the system's security. The notice must be sent "without unreasonable delay" to any Pennsylvania resident whose unencrypted and unredacted personal information was or is reasonably believed to have been accessed and acquired by an unauthorized person. (73 Pa. Stat. Ann. § 2303(a).)

Under the BPINA, personal information is an individual's first name or first initial and last name, with one or more of any of the following unredacted or unencrypted information:

- Social Security number.
- Driver's license number or state identification card number issued in lieu of a driver's license.
- Financial account number, credit or debit card number, with any required code or password that allows access to an individual's financial account.

This does not include publicly available information that is lawfully made available to the general public from federal, state or local government records. (73 Pa. Stat. Ann. § 2302(a).)

Covered Employers

All entities that maintain, store or manage computerized data that includes personal information are covered under this law (73 Pa. Stat. Ann. § 2303).

Covered Employees

All individuals in Pennsylvania are covered under this law (73 Pa. Stat. Ann. § 2303).

Co-worker Violations

The law does not address co-worker violations.

Private Right of Action

There is no private right of action under this law (73 Pa. Stat. Ann. § 2308).

Administration

The Pennsylvania Attorney General (PAAG) administers and enforces this law (73 Pa. Stat. Ann. § 2308).

PRIVACY OF SOCIAL SECURITY NUMBERS: 74 PA. STAT. ANN. § 201**Protected Activity**

Title 74, Section 201 of the Pennsylvania Statutes prohibits a person, entity or state entity from:

- Publicly posting or displaying an individual's Social Security number.
- Printing a Social Security number on any card required for an individual to access products by the person, entity or state agency.

- Requiring an individual to send a Social Security number online using an unencrypted connection.
- Requiring an individual to use the individual's Social Security number to access a website.
- Printing a Social Security number on materials that are mailed to an individual, unless otherwise legally required.
- Disclosing the Social Security number of a person who applies for a recreational license.

(74 Pa. Stat. Ann. § 201.)

Covered Employers

All persons, entities and state agencies are covered under this law.

Covered Employees

All individuals in Pennsylvania are covered under this law.

Co-worker Violations

The law does not address co-worker violations.

Private Right of Action

The law does not provide for a private right of action.

Administration

The PAAG administers and enforces this law (74 Pa. Stat. Ann. § 201(g)).

THE MENTAL HEALTH PROCEDURES ACT: 50 PA. STAT. ANN. §§ 7101 TO 7503**Protected Activity**

Under Title 50, Section 7111 of the Pennsylvania Statutes, documents about a person's treatment for a mental health condition cannot be disclosed without the person's written consent, except to:

- Parties that provide treatment for the person.
- The county administrator.
- A court, in the course of legal proceedings under this law.
- Follow federal law governing disclosure of patient information, if treatment is by a federal agency.

(50 Pa. Stat. Ann. § 7111.)

The confidentiality provisions apply to all:

- Involuntary treatment of a mental illness, whether inpatient or outpatient.
- Voluntary treatment of a mental illness requiring at least part-time residence in a facility.

(50 Pa. Stat. Ann. § 7103.)

Covered Employers

All persons, entities and state agencies are covered under this law.

Covered Employees

All individuals in Pennsylvania are covered under this law.

Co-worker Violations

The law does not address co-worker violations.

Private Right of Action

Aggrieved individuals have a private right of action under this law (50 Pa. Stat. Ann. § 7113).

Administration

The law does not specify an entity that administers this law.

PERSONNEL FILES

2. For any law in Question 1 regarding employer maintenance of personnel files, please describe:

- What constitutes a personnel file in your jurisdiction.
- Which records employers must maintain and for how long.
- Any records that must be kept separately.
- Any records that should not be included in an employee's personnel file.
- How records must be maintained (for example, in digital or paper form, or in locked drawers or rooms).
- Any requirements or prohibitions regarding destruction of records.

DEFINITION OF PERSONNEL FILE

Under the Pennsylvania Inspection of Employment Records Law (Personnel Files Act), a personnel file includes:

- An employment application.
- Wage or salary information.
- Notices of commendations, warning or discipline.
- Authorization for a deduction or withholding of pay.
- Fringe benefit information.
- Leave records.
- Employment history with the employer, including:
 - salary information;
 - job title;
 - dates of changes;
 - retirement record;
 - attendance records; and
 - performance evaluations.

(43 Pa. Stat. Ann. § 1321.)

Although case law is limited, Pennsylvania courts have held that letters of reference in academic peer reviews for tenure prepared by fellow faculty members are performance evaluations and considered part of a personnel file. However, letters of reference prepared by a third party who is independent of the employer's control do not constitute performance evaluations and are outside the scope of a personnel file. (See *Univ. of Pittsburgh v. Dep't of Labor & Indus.*, 896 A.2d 683 (Pa. Commw. 2006); *Lafayette Coll. v. Dep't of Labor & Indus.*, 546 A.2d 126 (Pa. Commw. 2006).)

REQUIRED RECORDS AND MAINTENANCE PERIOD

The Personnel Files Act does not:

- Require an employer to create or maintain particular records.
- Specify a maintenance period for the records.

However, other Pennsylvania employment-related laws, such as wage and hour and wage payment laws and fair employment practices laws, require employers to create and maintain certain personnel records. Employers that maintain records under other employment-related laws must make them available to the employee

for inspection if those documents are deemed personnel files under the Personnel Files Act. The Personnel Files Act covers all documents that meet the statutory definition of a personnel file, even if a supervisor keeps the document separately or informally.

SEPARATE RECORDS

The Personnel Files Act does not require that particular personnel file records be kept separately.

EXCLUSIONS FROM PERSONNEL FILES

Under the Personnel Files Act, a personnel file does not include:

- An employee's records relating to the investigation of a possible criminal offense.
- Letters of reference.
- Documents developed or prepared for use in civil, criminal or grievance procedures.
- Medical records or materials used by the employer to plan for future operations.
- Information available to the employee under the Fair Credit Reporting Act.

(43 Pa. Stat. Ann. § 1321.)

HOW TO MAINTAIN RECORDS

The Personnel Files Act does not specify the manner in which files must be maintained.

DESTRUCTION OF RECORDS

The Personnel Files Act does not specify the manner in which files must be maintained.

3. For any law in Question 1 regarding employee access to personnel files, please describe:

- Who may access the files, such as employees, applicants and former employees.
- Whether individuals may copy the files or only inspect them.
- When access must be granted (and whether it must be granted within a set period of time).
- Any limitations on access.

RIGHT OF ACCESS

Under the Pennsylvania Inspection of Employment Records Law (Personnel Files Act), when requested by an employee, an employer must allow the employee or the employee's designated agent to inspect the employee's personnel files used to determine the employee's qualifications for:

- Employment.
- Promotion.
- Additional compensation.
- Termination.
- Disciplinary action.

(43 Pa. Stat. Ann. § 1322.)

The employer must make the records available during the regular business hours of the office where the records are usually and

ordinarily maintained, when sufficient time is available during the course of a regular business day, to inspect the personnel files in question. The employer may require the requesting employee or the employee's designated agent to:

- Inspect the records on the employee's or agent's free time.
- File a written form requesting access to the files or to designate an agent to access and inspect the file.
- State in the written request either or both:
 - the purpose for which the inspection is being requested; or
 - the particular parts of the personnel record to be inspected.

(43 Pa. Stat. Ann. § 1322.)

However, the Personnel Files Act does not require an employer to produce a personnel record in the context of a workers' compensation hearing (*Tady v. Workers' Comp. Appeal Bd.*, 485 A.2d 897, 900 (Pa. Commw. 1985)).

COPYING OR INSPECTION

Under the Personnel Files Act, an employee must have access to the employee's personnel files for inspection. The employee or the employee's agent may take notes during the inspection. However, the employer is not required to allow the employee or the agent to:

- Remove the personnel file from the employer's premises.
- Make or obtain a copy of the personnel file's contents.

In addition, the employer may require that the file be inspected in the presence of an official that the employer designates. (43 Pa. Stat. Ann. § 1323.)

REQUIRED RESPONSE TIME

The Personnel Files Act does not specify a time limit for the employer to respond to an employee request for file access. However, the law specifies that if the employee makes a request, the employer must permit inspection at reasonable times. (43 Pa. Stat. Ann. § 1322.)

LIMITATIONS ON ACCESS

Except for reasonable cause, an employer may limit inspection of a personnel file to once every calendar year by an employee and once every calendar year by the employee's designated agent (43 Pa. Stat. Ann. § 1323).

MEDICAL OR OTHER TEST RESULTS

4. For any law in Question 1 that protects employees from medical examinations, including AIDS/HIV tests, or other tests, such as psychological or personality tests, please describe any limitations on access to test results or the protection of records.

CONFIDENTIALITY OF HIV-RELATED INFORMATION ACT: 35 PA. STAT. ANN. §§ 7601 TO 7612

Under the Confidentiality of HIV-Related Information Act (Information Act), a person who obtains confidential HIV-related information while providing any health or social service may only disclose that information to the following persons:

- The subject.

- The physician who ordered the test.
- A person specifically designated in a written consent.
- An agent, employee or medical staff member of the healthcare provider involved in treating or providing medical care to the subject when a healthcare provider has received confidential HIV-related information during the subject's diagnosis or treatment by the healthcare provider.
- Certain peer review organizations, individual healthcare providers, insurers, departments of health and local boards and county agencies.
- A person allowed access to the information by court order.
- A funeral director responsible for the acceptance and preparation of the deceased subject.

Recipients of confidential HIV-related information cannot disclose the information again unless the Information Act specifies otherwise. (35 Pa. Stat. Ann. § 7607.)

PENNSYLVANIA DRUG AND ALCOHOL ABUSE CONTROL ACT: 71 PA. STAT. ANN. §§ 1690.101 TO 1690.115

Under the Pennsylvania Drug and Alcohol Abuse Control Act, patient records prepared or maintained by county-based drug and alcohol abuse treatment facilities and programs must remain confidential. The records may only be disclosed:

- With the patient's consent.
- To medical personnel exclusively for the patient's diagnosis and treatment.
- To government or other officials to obtain benefits for the patient for the patient's substance abuse or dependence.
- In an emergency where the patient's life is in danger.
- In accordance with a court order.

(71 Pa. Stat. Ann. § 1690.108.)

THE MENTAL HEALTH PROCEDURES ACT: 50 PA. STAT. ANN. §§ 7101 TO 7503

Under the Mental Health Procedures Act (MHPA), documents about a person's treatment for a mental health condition cannot be disclosed without the person's written consent, except to:

- Parties that provide treatment to the person.
- The county administrator.
- A court, in the course of legal proceedings under this law.
- Following federal law governing disclosure of patient information, if treatment is by a federal agency.

(50 Pa. Stat. Ann. § 7111.)

The confidentiality provisions apply to all:

- Involuntary treatment of a mental illness, whether inpatient or outpatient.
- Voluntary treatment of a mental illness requiring at least part-time residence in a facility.

(50 Pa. Stat. Ann. § 7103.)

EMPLOYEE ELECTRONIC COMMUNICATIONS

5. For any law in Question 1 that governs the monitoring or recording of employees' electronic communications, please describe what monitoring or recording is permitted or prohibited in each of the following mediums:

- Telephone.
- Internet.
- E-mail.
- Other.

THE PENNSYLVANIA WIRETAPPING AND ELECTRONIC SURVEILLANCE CONTROL ACT: 18 PA. CONS. STAT. §§ 5701 TO 5782

Telephone Communications

Under the Pennsylvania Wiretapping and Electronic Surveillance Act (Wiretap Act), a person cannot intentionally:

- Intercept or attempt to intercept wire, electronic and oral communications.
- Use or disclose, or attempt to use or disclose the contents of a non-consensual, intentionally intercepted communication.

(18 Pa. Cons. Stat. § 5703.)

A telephone conversation is protectable as an oral or wire communication (*Deck, 954 A.2d at 609*). Under the Wiretap Act:

- An oral communication is any communication made orally by a person who has an expectation that the communication is not subject to interception under circumstances justifying the expectation.
- A wire communication is any aural transfer made in whole or in part through facilities that transmit or communicate by wire, cable or other connection between the point of origin and the point of reception. This includes any electronic storage of such communication.

(18 Pa. Stat. Ann. § 5702.)

Therefore, a telephone conversation is covered under the Wiretap Act even when a person on a telephone conversation had no reasonable expectation of privacy (for example, on speakerphone). (*Deck, 954 A.2d at 609*.)

The exceptions to the Wiretap Act are:

- When all parties to a communication have given prior consent.
- For personnel of a business engaged in telephone marketing or telephone customer service if:
 - the interceptions are made solely for training, quality control or monitoring by the business; and
 - one party in the communications has consented to the interception.

(18 Pa. Cons. Stat. § 5704(4), (15).)

Internet Usage and E-mail Communications

In *Commonwealth v. Proetto*, the court found that the act of sending e-mail demonstrates that the sender expressly consents to the recording, similar to leaving a voicemail message where the caller knows the message is being recorded (771 A.2d 823, 830 (Pa. Super. Ct. 2001)).

Other Forms of Communication

Text messages constitute an electronic communication under the

Wiretap Act (*Commonwealth v. Koch, 39 A.3d 996, 1003 (Pa. Super. Ct. 2011)*). In addition, text messages do not require an expectation of privacy on the sender's behalf to constitute an electronic communication under the Wiretap Act (18 Pa. Cons. Stat. § 5702).

SEARCHES, SURVEILLANCE AND BIOMETRIC INFORMATION

6. For any law in Question 1 that governs searches and surveillance, please describe:

- Any limits on employer searches (such as searches in common areas or individual offices).
- What kind of surveillance, tracking or monitoring of workplaces or employees is permitted (such as by GPS or video, or surveillance of an employee's computer or phone usage) and whether there are any limitations on the areas that can be monitored or recorded.
- Any limits on the use of biometric information (such as fingerprint, retina or voiceprint scans used for identification).

WORKPLACE SEARCHES

In Pennsylvania, workplace searches are governed under Pennsylvania common law, specifically tort law in the area of privacy. Under Pennsylvania law, employees have a right to be free from searches which are unreasonable intrusions into their seclusion (see *Restatement (Second) of Torts § 652B*). When determining whether an employer's search was invalid, Pennsylvania courts apply a balancing test between:

- The burden of the intrusion on the employee.
- The extent of the intrusion against the employer's legitimate interest in operating the business.

(*Smyth v. Pillsbury Co., 914 F. Supp. 97, 98 (E.D. Pa. 1996)*.)

SURVEILLANCE AND TRACKING

While the Pennsylvania Wiretapping and Electronic Surveillance Control Act (Wiretap Act) prohibits the intentional interception of wire electronic or oral communication, it does not prohibit visual surveillance. Therefore, an employer may maintain hidden cameras in the workplace so long as the employer does not record sound. However, employers should be aware of the duty not to invade their employees' privacy (for example, placing hidden cameras in the restroom) (see *Audenreid v. Circuit City Stores, Inc., 97 F. Supp. 2d 660 (E.D. Pa. 2000)*).

Title 18, Section 5761 of the Pennsylvania Statutes and Consolidated Statutes provides that a court of common pleas may issue an order to install and use a tracking device. However, an employer cannot monitor movement within an area protected by a reasonable expectation of privacy unless there are exigent circumstances supported by probable cause that both:

- Criminal activity has been or will be committed in the protected area.
- The use of a mobile tracking device in the protected area will yield information relevant to the investigation of the criminal activity.

(18 Pa. Cons. Stat. § 5761(a), (g).)

BIOMETRIC INFORMATION

There are no statutory limits on the use of biometric information in Pennsylvania.

NOTICE TO EMPLOYEES

7. For each privacy law listed in response to Question 1, what obligations does an employer have to inform its employees of their rights?

THE PENNSYLVANIA WIRETAPPING AND ELECTRONIC SURVEILLANCE CONTROL ACT: 18 PA. CONS. STAT. §§ 5701 TO 5782

The Pennsylvania Wiretapping and Electronic Surveillance Control Act (Wiretap Act) does not require employers to provide notice of employees' rights. An employer may lawfully intercept oral or electronic communications under the Wiretap Act with consent. (*Consol. Rail Corp. v. Colville*, 19 Pa. D. & C.3d 545, 551-52 (C.P. 1981).)

THE PENNSYLVANIA INSPECTION OF EMPLOYMENT RECORDS LAW (PERSONNEL FILES ACT): 43 PA. STAT. ANN. §§ 1321 TO 1324

The law does not specify an obligation to inform employees of their rights.

CONFIDENTIALITY OF HIV-RELATED INFORMATION ACT: 35 PA. STAT. ANN. §§ 7601 TO 7612

The law does not specify an obligation to inform employees of their rights.

PENNSYLVANIA DRUG AND ALCOHOL ABUSE CONTROL ACT: 71 PA. STAT. ANN. §§ 1690.101 TO 1690.115

The law does not specify an obligation to inform employees of their rights.

BREACH OF PERSONAL INFORMATION NOTIFICATION ACT: 73 PA. STAT. ANN. §§ 2301 TO 2329

The law does not specify an obligation to inform employees of their rights.

PRIVACY OF SOCIAL SECURITY NUMBERS: 74 PA. STAT. ANN. § 201

The law does not specify an obligation to inform employees of their rights.

THE MENTAL HEALTH PROCEDURES ACT: 50 PA. STAT. ANN. §§ 7101 TO 7503

The law does not specify an obligation to inform employees of their rights.

CONSEQUENCES FOR VIOLATION

8. For each privacy law listed in response to Question 1, what are possible consequences for employers that violate the law?

THE PENNSYLVANIA WIRETAPPING AND ELECTRONIC SURVEILLANCE CONTROL ACT: 18 PA. CONS. STAT. §§ 5701 TO 5782

An employer may face third degree felony charges for intentionally:

- Intercepting, attempting to intercept, or causing another person to intercept or attempt to intercept any wire, electronic or oral communication.
- Disclosing or attempting to disclose to another person the contents of or evidence derived from any wire, electronic or oral communication, if the person knows or has reason to know that the information was obtained through an unlawful interception.
- Using or attempting to use the contents of or evidence derived from any wire, electronic or oral communication, if the person knows or has reason to know that the information was obtained through an unlawful interception.

(18 Pa. Stat. Ann. § 5703.)

Additionally, a person whose wire, electronic or oral communication is intercepted, disclosed or used in violation of this law may file a civil claim and recover:

- Actual damages, but not less than liquidated damages, at the higher of either:
 - \$100 a day for each day of violation; or
 - \$1,000.
- Punitive damages.
- A reasonable attorneys' fee and other reasonably incurred litigation costs.

(18 Pa. Stat. Ann. § 5725.)

THE PENNSYLVANIA INSPECTION OF EMPLOYMENT RECORDS LAW (PERSONNEL FILES ACT): 43 PA. STAT. ANN. §§ 1321 TO 1324

The law does not provide for civil damages, criminal penalties or other relief.

CONFIDENTIALITY OF HIV-RELATED INFORMATION ACT: 35 PA. STAT. §§ 7601 TO 7612

An aggrieved person may file a civil action against an employer and recover compensatory damages (35 Pa. Stat. Ann. § 7610). Each disclosure constitutes a separate violation (35 Pa. Stat. Ann. § 7611).

PENNSYLVANIA DRUG AND ALCOHOL ABUSE CONTROL ACT: 71 PA. STAT. ANN. §§ 1690.101 TO 1690.115

The law does not specify any consequences for a violation.

BREACH OF PERSONAL INFORMATION NOTIFICATION ACT: 73 PA. STAT. ANN. §§ 2301 TO 2329

An employer that violates this law faces civil action from the state Office of the Attorney General for an unfair or deceptive act under the Pennsylvania Unfair Trade Practice and Consumer Protection Law (73 Pa. Stat. Ann. § 2308).

PRIVACY OF SOCIAL SECURITY NUMBERS: 74 PA. STAT. ANN. § 201

An employer that violates this law may be required to pay a fine between:

- \$50 and \$500 for a first violation.
- \$500 and \$5,000 for a second or subsequent violation.

(74 Pa. Stat. Ann. § 201(g).)

THE MENTAL HEALTH PROCEDURES ACT: 50 PA. STAT. ANN. §§ 7101 TO 7503

An employer that violates the Mental Health Procedures Act may be required to pay for emotional, physical or monetary damages in a civil action for invasion of privacy, negligence or another tort claim (see *O'Donnell v. United States*, 891 F.2d 1079, 1086 (3d Cir. 1989)).

CONSENT

9. For each privacy law listed in response to Question 1, is employee consent required? If not, will employee consent protect the employer from liability?

THE PENNSYLVANIA WIRETAPPING AND ELECTRONIC SURVEILLANCE CONTROL ACT: 18 PA. CONS. STAT. §§ 5701 TO 5782

An employer's interception of wire, electronic or oral communication is

lawful if all parties to the communication have given prior consent to the interception (18 Pa. Cons. Stat. § 5704). However, Pennsylvania law does not specify the form of consent that must be obtained. In *Consolidated Rail Corp. v. Colville*, the court held that the employer's warning to employees that some phone conversations could be recorded and that all calls had an intermittent beeping to remind the employees of that fact constituted consent. (*Colville*, 19 Pa. D. & C.3d at 552-53.)

THE PENNSYLVANIA INSPECTION OF EMPLOYMENT RECORDS LAW (PERSONNEL FILES ACT): 43 PA. STAT. ANN. §§ 1321 TO 1324

The law does not specify whether employee consent is required.

CONFIDENTIALITY OF HIV-RELATED INFORMATION ACT: 35 PA. STAT. ANN. §§ 7601 TO 7612

An employer must obtain written consent to disclose HIV-related information about an employee, unless an exception to the prohibition on disclosure applies (see *Question 4: Confidentiality of HIV-related Information Act*) (35 Pa. Stat. Ann. § 7607).

PENNSYLVANIA DRUG AND ALCOHOL ABUSE CONTROL ACT: 71 PA. STAT. ANN. §§ 1690.101 TO 1690.115

An employer must obtain written consent to obtain documents related to an employee's treatment for drug or alcohol abuse, unless an exception to the prohibition on disclosure applies (see *Question 4: Pennsylvania Drug and Alcohol Abuse Control Act*) (71 Pa. Stat. Ann. § 1690.108).

BREACH OF PERSONAL INFORMATION NOTIFICATION ACT: 73 PA. STAT. ANN. §§ 2301 TO 2329

The law does not specify whether employee consent is required.

PRIVACY OF SOCIAL SECURITY NUMBERS: 74 PA. STAT. ANN. § 201

The law does not specify whether employee consent is required.

THE MENTAL HEALTH PROCEDURES ACT: 50 PA. STAT. ANN. §§ 7101 TO 7503

An employer must obtain written consent to disclose documents about an employee's treatment for a mental health condition, unless an exception to the prohibition on disclosure applies (see *Question 4: The Mental Health Procedures Act*) (50 Pa. Stat. Ann. § 7111).

RECORDKEEPING

10. What are the recordkeeping obligations for each privacy law listed in response to Question 1?

THE PENNSYLVANIA WIRETAPPING AND ELECTRONIC SURVEILLANCE CONTROL ACT: 18 PA. CONS. STAT. §§ 5701 TO 5782

An employer that lawfully intercepts a wire, electronic or oral communication must record the communication by tape or a comparable method. The recording must be done in a manner that will protect it from alterations. When an interception is being monitored, the monitor must be a certified investigative or law enforcement officer and where practicable, the employer must keep a signed, written record specifying:

- The date and hours of surveillance.
- The time and duration of each intercepted communication.
- The participant, if known, in each intercepted conversation.
- A summary of the content of each intercepted communication. (18 Pa. Cons. Stat. § 5714.)

THE PENNSYLVANIA INSPECTION OF EMPLOYMENT RECORDS LAW (PERSONNEL FILES ACT): 43 PA. STAT. ANN. §§ 1321 TO 1324

The law does not specify recordkeeping obligations.

CONFIDENTIALITY OF HIV-RELATED INFORMATION ACT: 35 PA. STAT. ANN. §§ 7601 TO 7612

The law does not specify recordkeeping obligations.

PENNSYLVANIA DRUG AND ALCOHOL ABUSE CONTROL ACT: 71 PA. STAT. ANN. §§ 1690.101 TO 1690.115

The law does not specify recordkeeping obligations.

BREACH OF PERSONAL INFORMATION NOTIFICATION ACT: 73 PA. STAT. ANN. §§ 2301 TO 2329

The law does not specify recordkeeping obligations.

PRIVACY OF SOCIAL SECURITY NUMBERS: 74 PA. STAT. ANN. § 201

The law does not specify recordkeeping obligations.

THE MENTAL HEALTH PROCEDURES ACT: 50 PA. STAT. ANN. §§ 7101 TO 7503

The law does not specify recordkeeping obligations.

EMPLOYEES' LAWFUL, OFF-DUTY ACTIVITY

11. To the extent not described in Question 1, please state whether an employee's lawful, off-duty use of or activity in any of the following is protected and describe any limits to the protections:

- Tobacco use or use of other consumable goods.
- Online activities, including posting on social media sites.
- Other activities, including gun ownership or political activities.

TOBACCO OR CONSUMABLE GOODS USE

An employee's lawful, off-duty use of tobacco is not protected under the Pennsylvania statutes.

In addition, Pennsylvania law prohibits smoking in a public place (35 Pa. Stat. Ann. § 637.3(a)). Workplaces are considered public places under Pennsylvania law (35 Pa. Stat. Ann. § 637.2). However, there is an exception for:

- A workplace of a manufacturer, importer or wholesaler of tobacco products.
- A manufacturer of tobacco-related products, including lighters.
- A tobacco leaf dealer or processor.
- A tobacco storage facility.

(35 Pa. Stat. Ann. § 637.3(b)(4).)

Nevertheless, an owner of a public or private property may prohibit smoking on the property (35 Pa. Stat. Ann. § 637.3(a)).

ONLINE ACTIVITIES

Pennsylvania law does not specify whether an employee's lawful, off-duty online activities are protected.

OTHER ACTIVITIES

Intimidation of Voters

Title 25, Section 3547 of the Pennsylvania Statutes prohibits any person or entity from directly or indirectly intimidating a person from or for:

- Voting or not voting at any election.
- Voting or not voting for or against:
 - a candidate; or
 - a question submitted to voters.
- Registering or not registering to vote.

(25 Pa. Stat. Ann. § 3547.)

There is no published case law in Pennsylvania interpreting Title 25, Section 3547 of the Pennsylvania Statutes. However, an employee may be able to file a wrongful discharge claim based on public policy against an employer that made an adverse employment action or the threat of an adverse employment action based on an employee's voting behavior. In *Novosel v. Nationwide Insurance Co.*, the US Court of Appeals for the Third Circuit, analyzing Pennsylvania law, held that an employer's intrusion into an area of an employee's life in which the employer has no legitimate interest may give rise to a cause of action, especially where some recognized facet of public policy is threatened (721 F.2d 894, 897-98 (3d Cir. 1982)). However, Pennsylvania cases decided after *Novosel* have held that wrongful discharge claims based on public policy must be based on a public policy of Pennsylvania and not another jurisdiction (*McLaughlin v. Gastrointestinal Specialists, Inc.*, 750 A.2d 283, 290 (Pa. 2000)).

Disclosure of an Employee's Handicap or Disability

The Pennsylvania Human Relations Act (PHRA) requires that information about an employee's past, present or recurring handicap or disability, medical condition or medical history be treated as a medical record in terms of confidentiality and retention. Relevant information may only be released if the employee consents or when the employer can show a demonstrable business necessity including, but not limited to, a need for information to be released to:

- Supervisors, if the information is about:
 - restrictions on the work or duties of an employee with a disability; or
 - necessary accommodations for an employee with a disability.
- First aid, safety and other personnel, if the employee's medical condition or disability may require emergency treatment or extraordinary measures by the personnel if there is a safety hazard.
- Government agencies, to investigate compliance with any law.
- Authorized representatives of labor organizations, if there is a bona fide labor dispute or grievance procedure.
- Insurers, for bona fide insurance purposes.

(16 Pa. Code § 44.12.)

INVASION OF PRIVACY CLAIMS

12. For invasion of privacy claims in your jurisdiction, please describe:

- The elements of an invasion of privacy claim, or factors relevant to the analysis.
- Affirmative or other defenses available to the employer.
- Examples of circumstances in which employees have been found to have a reasonable expectation of privacy in the workplace.

CLAIM ELEMENTS

In Pennsylvania, tort claims for invasion of privacy can be based on one of four theories:

- Intrusion on another's seclusion.
- Appropriation of another's name or likeness.
- Publicity given to another's private life.
- Publicity that unreasonably places a person in a false light before the public.

(*Santillo v. Reedel*, 634 A.2d 264, 266 (Pa. Super. Ct. 1993).)

Intrusion on Seclusion

Under an intrusion on seclusion invasion of privacy claim, an employee must show that:

- The employer intentionally intruded, physically or otherwise, on the employee's solitude, seclusion or private affairs.
- The intrusion would be highly offensive to a reasonable person.

(*Chicarella v. Passant*, 494 A.2d 1109, 1114 (Pa. Super. Ct. 1985).)

The invasion on seclusion may be:

- By physical intrusion into a place in which the employee has secluded himself.
- By the use of the employer's senses to oversee or overhear the employee's private affairs.
- An investigation or examination into the employee's private concerns (for example, by opening the employee's private and personal mail).

An action based on intrusion on seclusion does not require an employee to prove publication as an element of the tort. (*Harris by Harris v. Easton Pub. Co.*, 483 A.2d 1377, 1383 (Pa. Super. Ct. 1984).)

An employer is liable for intrusion only if the intrusion is both:

- Substantial.
- Highly offensive to a reasonable person.

(See *Boring v. Google, Inc.*, 362 F. App'x 273, 279-80 (3d Cir. 2010).)

Publicity Given to Private Life

Under Section 652D of the Restatement (Second) of Torts, the tort of publicity given to private life is when publicity is given to matters concerning the private life of another, where the matter publicized is of a kind that both:

- Would be highly offensive to a reasonable person.
- Is not a legitimate concern to the public.

(*Restatement (Second) of Torts* § 652D.)

An employee must show publicity that is unreasonable, given to private life and highly offensive to a reasonable person (*Harris*, 483 A.2d at 1384).

Courts have found that communicating something to a small group does not constitute publicity (*Vogel v. W.T. Grant Co.*, 327 A.2d 133, 137 (Pa. 1974)).

False Light Publicity

Under an invasion of privacy claim for false light publicity, an employee must show that:

- The employer gave publicity to a matter concerning the employee in a false light.
- The false light would be highly offensive to a reasonable person.
- The employer knew or recklessly disregarded the falsity of the statement.

(*Restatement (Second) of Torts* § 652E.)

Appropriation of Another's Name or Likeness

An employer that appropriates for its own use or benefit another's name or likeness may be liable to the other for invasion of privacy (*Restatement (Second) of Torts* § 652C; *Eagle v. Morgan*, No. 11-4303, 2013 WL 943350, at *7-8 (E.D. Pa. Mar. 12, 2013)).

In *Eagle v. Morgan*, the Eastern District of Pennsylvania, analyzing Pennsylvania law, held that a defendant appropriated a plaintiff's reputation and prestige when the defendant took over the URL for the plaintiff's LinkedIn page and changed the information on that page to reflect another person's information. Although the defendants did not use the plaintiff's likeness or credentials, the court held that the plaintiff had a privacy interest in her name. (*Eagle*, 2013 WL 943350 at *7-8.)

EMPLOYER DEFENSES

Employer defenses to invasion of privacy claims include:

- Denying that the employee had a reasonable expectation of privacy (for an intrusion to seclusion invasion of privacy tort).
- Otherwise refuting the elements of the invasion of privacy tort.

(See *Smyth v. Pillsbury*, 914 F.Supp. 97 (E.D. Pa. 1996).)

REASONABLE EXPECTATION OF PRIVACY

There are few cases in Pennsylvania that address privacy claims in the workplace. When determining whether an employee had a reasonable expectation of privacy, courts balance an employee's privacy rights against an employer's interests. (*Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 625 (3d Cir. 1992).)

If an employer carries out an authorized inquiry into an employee's private concerns, then the employer must do so in a way that protects the employee's privacy. For example, in *Doe v. Kohn Nast & Graf, P.C.*, the employee claimed that the employer opened the employee's personal mail that the employee received at work. The court rejected the employer's argument that the employer was authorized to open any mail sent to plaintiff at its address, holding that the employer:

- Cannot open any mail that appears to be personal.
- Must perform the task in a way that protects the employee's privacy, even if the employer is authorized to open the employee's mail.

(866 F. Supp. 190, 195-96 (E.D. Pa. 1994).)

Pennsylvania courts have generally allowed employers to conduct reasonable workplace surveillance. For example, in *Hineline v. Stroudsberg Electric Supply Co.*, an employee disengaged the

employer's surveillance system and was terminated as a result. The court held that the termination was not against Pennsylvania public policy, even if the surveillance was done illegally, because the employee could have contacted law enforcement or filed a private claim instead. (559 A.2d 566, 569-70 (Pa. Super. Ct. 1989).)

For e-mail communications, Pennsylvania courts look at the totality of the circumstances to determine whether an employee had a reasonable expectation of privacy. For example, in:

- *Smyth v. Pillsbury Co.*, the employee claimed that interception of his work e-mail constituted an invasion of privacy, as the employer had regularly reassured its employees that all e-mail communications were confidential. The court, however, held that the employee had no reasonable expectations in his e-mail communications, even when the employer said otherwise. The court held that any reasonable expectation of privacy was lost once the employee communicated the alleged unprofessional comments to a second person (his supervisor) over an e-mail system that was apparently used by the entire company. (914 F. Supp. 97, 100-01 (E.D. Pa. 1996).)
- *Kelleher v. City of Reading*, the employee claimed that her employer intruded on the employee's seclusion by publishing private e-mails. The court held that an employee may have a reasonable expectation of privacy in certain e-mail communications, depending on the circumstances of communication and the configuration of the e-mail system. (No. 01-3386, 2001 WL 1132401, at *5 (E.D. Pa. Sept. 24, 2001).)

OTHER EMPLOYEE PRIVACY LAWS

13. Please list and briefly describe any additional employee rights with respect to privacy in the workplace not previously addressed.

There are no additional employee rights regarding privacy in the workplace in Pennsylvania.

ABOUT PRACTICAL LAW

Practical Law provides legal know-how that gives lawyers a better starting point. Our expert team of attorney editors creates and maintains thousands of up-to-date, practical resources across all major practice areas. We go beyond primary law and traditional legal research to give you the resources needed to practice more efficiently, improve client service and add more value.

If you are not currently a subscriber, we invite you to take a trial of our online services at practicallaw.com. For more information or to schedule training, call **888.529.6397** or e-mail ustraining@practicallaw.com.